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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 662.

DAMPSKIBSSELSKABET DANNEBROG, a corporation, Claimant of the Mortorship "Stjerneborg," and AKTIESELSKABET BORGESTAD, a corporation, Claimant of the Motorship "Brand," *Petitioners*,

v.

SIGNAL OIL AND GAS COMPANY OF CALIFORNIA, a corporation, *Respondent*.

PETITIONERS' REPLY BRIEF.

Upon Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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PETITIONERS' REPLY BRIEF.

Upon Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

INTRODUCTION.

In reply, petitioners follow the order of the respondent's answering brief, discussing:

1. The question of the charterer's authority to bind the vessels and their owners, arising from the charter party;

2. The question of respondent's credit reliance upon the vessels, arising from its general contract.

LIEN NOT AUTHORIZED BY CHARTER.

The charter parties of petitioners, as vessel owners, provided that "*the charterers shall provide and pay for all*" the fuel oil (R. 40). By this simple clause petitioners passed to the charterer and the charterer took to itself the whole responsibility as to fuel for the operation of the vessels.

Respondent's brief (pp. 3-4) says that by this provision petitioners empowered the charterer to order fuel oil. Petitioners reply that by this provision they obligated the charterer to do so. But this same provision equally and inseparably authorized and bound the charterer to pay for the fuel oil. There was no power vested in the charterer to provide, which was free from the duty to pay. Respondent may not divorce the two elements of this single duty entirely shifted from the vessel owners to the charterer by lawful agreement.

Petitioners' brief (p. 37) has asserted that the charter parties invested the charterer with no authority to pledge the credit of the vessels and impose a lien for fuel oil. In this, petitioners rely not only on principle but also on precedent. By petitioners' brief (pp. 41-46) this Court is referred to its own rulings in *The Kate*, 164 U. S. 458, and in *The Valencia*, 165 U. S. 264. In both cases the charter parties required that the "charterers shall provide and pay for" fuel without other language expressly negativing the charterer's authority. In both cases this Court held that from such words the charterer acquired no authority to hypothecate the vessels. In both the lien was denied. And petitioners contend that these decisions, based on closely comparable facts, fully support their position.

Respondent claims that these decisions are distinguishable, although its brief (p. 13) admits that they have never been criticized by any subsequent interpretation of this Court.

To distinguish *The Kate* and *The Valencia*, respondent says that this Court was there influenced to its exoneration

of the vessels by an element of fraud in the dealings between the supplier and charterer on which the lien was asserted. It is true that the opinion in *The Kate*, 164 U. S. 458, 465-470, while discussing earlier cases, does use the word "fraud" as applied to a supplier's claim of lien based on transactions with a master, as the owner's confidential agent, where the supplier had knowledge or notice that the master was without actual authority. But if the characterization of fraud was indirectly applied by this Court to the conduct of the suppliers in *The Kate*, *supra*, and also in *The Valencia*, *supra* (by the latter's quotation of the former), it still does not follow that those cases are distinguished on that ground from the present case. The transactions and the conduct of the lien claimants in those cases were not materially different from the activity and attitude of respondent in the present case. However, in commenting on the facts under immediate consideration, the opinion in *The Kate*, *supra*, did not charge actual fraud. Without use of so blunt a word, petitioners join with this Court in its description of a supplier's sale to an unauthorized charterer and a subsequent attempt to enforce a lien against the vessel.

> "As the charterer had agreed to provide and pay for all coal used by the vessel, he had no authority to bind the vessel for supplies furnished to it. His want of authority to charge the vessel for such an expense, was known or could have been known to the libellant by the exercise of due diligence on its part. Under the circumstances, the libellant was not entitled to deliver the coal on the credit of the vessel, and its attempt to hold the vessel liable is in bad faith to the owner. The law cannot approve or encourage such an attempt to wrong the owners of the vessel." *The Kate*, 164 U. S. 458, 465.

And while *The Kate*, *supra*, was quoted in *The Valencia*, 165 U. S. 264, 267, the later case denied the lien by recital of ultimate facts there involved without colorful insinuation of fraud, by saying:

"We mean only to decide, at this time, that one furnishing supplies or making repairs on the order simply of a person or corporation acquiring the control and possession of a vessel under such a charter party cannot acquire a maritime lien if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make inquiry and chose to act on a mere belief that the vessel would be liable for his claim." *The Valencia*, 264, 272.

For another reason respondent argues that *The Kate*, *supra*, and *The Valencia*, *supra*, are distinguishable. It says that those cases were decided before the passage of the Maritime Lien Act (Act of June 23, 1910; 36 Stat. 604) and its substantial reenactment in Section 30 of the Merchant Marine Act of June 5, 1920 (46 U. S. C. A. 971-975). To this point, respondent's brief (p. 14) cites the opinions of two lower courts: *The South Coast*, 247 Fed. 84 (C. C. A. 9) and *The J. W. Hennessy*, 57 Fed. (2d) 77 (C. C. A.). Both these opinions mentioned *The Kate* and *The Valencia*. But the appellate courts were passing upon demise charters containing very different provisions. Hence, they treated *The Kate* and *The Valencia* as not controlling. But neither court advanced any persuasive theory for concluding that the older decisions of this Court had become obsolete because of the subsequent Congressional legislation.

In *The J. W. Hennessy*, 57 Fed. (2d) 77, the opinion made no attempt to explain wherein the statute had deprived *The Kate* and *The Valencia* of their authoritative interpretation of the charter provisions involved in those cases. In fact, the opinion wisely did not even make any such statement. To do so would have been dictum since the charter party there in dispute was a "demise charter" by which "the charterer had exclusive use, control, possession and operation" of the vessel (p. 77). Reference in the opinion to *The Kate* and *The Valencia* was limited to the observation that: "*The Kate*, 164 U. S. 458, 17 S. Ct. 135, 41 L. Ed. 512, and *The Valencia*, 165 U. S. 264, 17 S. Ct. 323, 41 L. Ed. 710,

related to supplies furnished upon the order of a charterer prior to the passage of the Merchant Marine Act." The *J. W. Hennessy*, 57 Fed. (2d) 80.

In *The South Coast*, 247 Fed. 84, the district judge who wrote the opinion was considering another demise charter and determining whether necessaries ordered by the *master* (not the charterer) would entitle the supplier to a lien. While the opinion discussed the facts there pertinent, in contrast to the facts in *The Kate* and *The Valencia*, it never expressed the notion that those rulings of this Court were superseded by the 1910 Act. On the contrary, the district judge recognized their continuing vigor of authority by saying: "These cases of *The Kate* and *The Valencia* are therefore *without application, further than they purport to state general maritime law*". (Italics added) *The South Coast*, 247 Fed. 89, 90. Doubtless for the same reason, when that case was affirmed over the dissent of three members of this Court, no opinion discussed *The Kate* nor *The Valencia* which involved provisions unlike those in the "South Coast" demise but identical with those in the "Brand" and "Stjerneborg" charters. *The South Coast*, 251 U. S. 519.

Respondent has wholly failed to demonstrate that the rulings of *The Kate* and *The Valencia* have been superseded by the 1910 and 1920 Acts, because they really continue authoritative within their sphere of application.

The Kate and *The Valencia*, so far as invoked by the petitioners, held that a charter party provision requiring the charterer to "provide and pay for" fuel vests the charterer with no power to pledge the owner's vessel, and that a furnisher of supplies on the order of such a charterer, when the furnisher "knew or by reasonable diligence could have ascertained" such absence of power is not entitled to a lien. The subsequent legislation said nothing affecting judicial interpretation of any charter party. The later statutes not only did not abrogate this Court's rule placing upon the furnisher the burden to inquire, but they adopted and de-

clared the same rule (Section 3 of 1910 Act; Subsection R of 1920 Act).

In this connection, the Court is referred to the article entitled "The New Federal Statute Relating to Liens on Vessels" by Fitz-Henry Smith, Jr., (one instrumental in drafting the 1910 Act) which was published in January, 1911, by the Harvard Law Review, Volume 24, p. 182, et seq. The author, when discussing (p. 193) the same part of the statute, said:

> "The phrase, 'knew, or by the exercise of reasonable diligence, could have ascertained,' is adopted from The Kate, and was used in the Act of Congress to make it clear that if the furnisher know of the existence of a charter party or of an agreement for the sale of the vessel, he is put upon inquiry as to its terms, and cannot excuse himself by denying ignorance of the terms, *should it turn out that the charterer or agreed purchaser had undertaken to furnish the vessel at his own cost.*" (Italics supplied)

In notes published in 1935 by the Yale Law Journal, Volume 44, p. 698, *The Kate* is recognized as still declaring the law that no lien arises where supplies are ordered by one without authority to bind the vessel and the furnisher had knowledge or means of knowledge of such lack of authorization.

This Court has reiterated the opinion that, except in particulars not here material, the 1910 and 1920 statutes did not modify the general maritime law as to liens for necessaries. *The President Arthur*, 279 U. S. 564, 567, 568; *U. S.* v. *Carver*, 260 U. S. 482, 489; *Piedmont, etc., Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 11, 12; *The South Coast*, 251 U. S. 519, 523. And similar opinion has been indicated by the inferior admiralty courts in *The Western Wave*, 77 Fed. (2d) 695 (C. C. A. 5); *The Roseway*, 34 Fed. (2d) 130 (C. C. A. 2); *Morse D. D. & Repair Co.* v. *U. S.*, 1 Fed. (2d) 233 (C. C. A. 2); *Pensacola S. Co.* v. *U. S. Shipping Board*, 277 Fed. 889 (C. C. A. 5); *The Cratheus*, 263

Fed. 693 (C. C. A. 5); *The Yarmouth*, 262 Fed. 250 (C. C. A. 5); *The Yankee*, 233 Fed. 919 (C. C. A. 3); *The Western Wave*, 2 Fed. Supp. 386 (D. C. Texas); *The Ben Lawers*, 42 Fed. (2d) 897 (D. C. Wash.); *The Henry W. Breyer*, 17 Fed. (2d) 423 (D. C. Md.); *Ville de Djibouti*, 295 Fed. 869 (D. C. Pa.); *The Thordis*, 290 Fed. 255 (D. C. N. Y.); *The Sylvan Glen*, 241 Fed. 731 (D. C. Pa.).

While since the passage of the maritime lien statutes this Court has not had occasion to approve its rulings in *The Kate*, 164 U. S. 458, and *The Valencia*, 165 U. S. 264, either one or both of those cases have been recognized as authoritative where applicable, or have been expressly followed by the lower courts since the 1910 Act. *Starita Co.* v. *Compagnie Havraise, etc.*, 52 Fed. (2d) 58 (C. C. A. 2); *Pensacola S. Co.* v. *U. S. Shipping Board*, 277 Fed. 889 (C. C. A. 5); *The Yarmouth*, 262 Fed. 250 (C. C. A. 5); *The Hatteras*, 255 Fed. 518 (C. C. A. 2); *The Yankee*, 233 Fed. 919 (C. C. A. 3); *The Pajola*, 7 Fed. Supp. 618 (D. C. N. Y.); *The Henry W. Breyer*, 17 Fed. (2d) 423 (D. C. Md.); *Ville de Djibouti*, 295 Fed. 869 (D. C. Pa.); *The Thordis*, 290 Fed. 255 (D. C. N. Y.); *The Millinocket*, 266 Fed. 392 (D. C. N. Y.).

In cases not reaching this Court, "provide-and-pay" provisions, similar to those in the "Brand" and "Stjerneborg" charter parties, have been considered not to authorize the charterer to bind the vessels and their owners. *The Pajola*, 7 Fed. Supp. 618 (D. C. N. Y.); *The Ben Lawers*, 42 Fed. (2d) 897 (D. C. Wash.); *The Dictator*, 18 Fed. (2d) 131 (D. C. La.); *The Henry W. Breyer*, 17 Fed. (2d) 423 (D. C. Md.); *Ville de Djibouti*, 295 Fed. 869 (D. C. Pa.); *The Thordis*, 290 Fed. 255 (D. C. N. Y.); *The Millinocket*, 266 Fed. 392 (D. C. N. Y.); *The Eastern*, 257 Fed. 874 (D. C. Mass.); *The Sylvan Glen*, 241 Fed. 731 (D. C. La.); *Starita Co.* v. *Compagnie Havraise, etc.*, 52 Fed. (2d) 58 (C. C. A. 2); *The Hammond*, 30 Fed. (2d) 890 (C. C. A. 5); *The Penza*, 9 Fed. (2d) 527 (C. C. A. 2); *The Mona*, 282 Fed. 468 (C. C. A. 4); *Pensacola S. Co.* v. *U. S. Shipping Board*, 277

Fed. 889 (C. C. A. 5); *The Cratheus*, 263 Fed. 693 (C. C. A. 5); *The Yarmouth*, 262 Fed. 250 (C. C. A. 5).

Petitioners submit that respondent has failed both by its own argument and by its citation of lower court opinions to demonstrate any weakness in this Court's former rulings in *The Kate*, 164 U. S. 458, and *The Valencia*, 165 U. S. 264. Because these decisions rest on sound interpretations of charter party clauses which are the same as those in the "Brand" and "Stjerneborg" charters, it follows that W. L. Comyn & Sons, as the charterer, had no authority by which respondent could acquire a lien.

Respondent's brief (pp. 18, 19) almost ventures the hint that it was not chargeable with petitioners' limitation upon the charterer's authority. But no serious contention to this effect is open to respondent. By the general contract which respondent made for future sales to W. L. Comyn & Sons that concern was accepted as a buyer for oil to be supplied later to "any and all vessels owned, chartered and/or operated" by it (R. 32, 58; Ex. D). This contract was effective as to W. L. Comyn & Sons in May, 1933 (R. 32). And respondent has stipulated in this case that, both before and after that time, it knew or could have easily learned that W. L. Comyn & Sons was in business, not as a vessel owner, but as a commission merchant, a freight contractor and broker, and as a operator of vessels, sometimes for owner's account and sometimes for charterer's account (R. 41). All this respondent knew approximately a year before it filled orders of W. L. Comyn & Sons in 1934 for the petitioners' vessels. As to the "Brand", its chief engineer accepted in April and again in May a supply to that vessel only "*for time charterer's account*", according to each of his qualified written receipts given at the time of successive deliveries (R. 37-38). As to the "Stjerneborg", in ordering fuel oil W. L. Comyn & Sons especially advised respondent that such vessel was then "on our time charter" (R. 38). To all these facts respondent has stipulated (R. 31-154).

Subsection R, Section 30, of the 1920 statute said that no lien shall be conferred "when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, * * * the person ordering the * * * supplies * * * was without authority to bind the vessel therefor" (46 U. S. C. A. 973).

Hence, coupling this Court's interpretation of the charter party provision in *The Kate*, *supra*, and *The Valencia*, *supra*, with the rule of those cases as affirmed by the statute, it follows that the question of authority in this case should be resolved against respondent and its claim of lien.

Respondent's brief (p. 4) insists that *The South Coast*, 251 U. S. 519, is controlling. Petitioners repeat their assertion that it is not in point. The opinion in that case shows that different charter terms reflected an intention that lien might be imposed by the charterer. In this case no language reflects any such intention by petitioners. The opinion in that case shows that "the master ordered" the supplies (p. 522). In this case, the supplies were sold solely on the charterer's order (R. 37, 38, 39). The opinion in that case shows that the charter party was a demise—"the bare vessel at the time was under charter" (p. 522). In this case, the charter was not a demise—the charter party by clause 25 expressly declared to the contrary: "Nothing herein stated is to be construed as a demise of the steamer to the time charterers" (R. 124, 135).

In consequence, upon the charter point respondent's claim of lien fails.

LIEN NEGATIVED BY OIL CONTRACT.

As to the question of respondent's exclusive credit reliance upon the personal obligation of W. L. Comyn & Sons with whom it dealt under its general sales contract, the respondent's brief (pp. 16-22) offers very little in answer to the contention of petitioners.

Respondent tacitly confesses that it, too, is unable to cite any opinion by this court determining the effect upon a

maritime lien of a future supply contract like respondent's, which bound it to furnish fuel for "any and all vessels" which might be subsequently "owned, chartered and/or operated" (R. 32).

The respondent comments on the decisions in the *President Arthur*, 279 U. S. 564, and *Piedmont etc. Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, as if petitioners had cited them as being squarely in point on the facts. Admittedly they involved different contracts. Petitioners turned to those cases simply to quote this court's statements of applicable principle.

Directed to the question of respondent's credit reliance arising out of its contract, respondent cites only two cases: *The Everosa*, 93 F. (2) 732 (C. C. A. 1); and *The Bronx*, 246 F. 809 (C. C. A. 2).

The Everosa, supra, was discussed by petitioners' main brief in this court (pp. 30, 31). As there stated, by the opinion of the appellate court, the effect of the supplier's contract was not investigated. The Circuit Court of Appeals, by express comment, declared that another point was decisive. The greatest support that respondent can derive from the decision is its reversal of the lower court in *The Everosa*, 18 F. Supp. 186 (D. C. R. I.) which was favorable to petitioner's contention.

The Bronx, supra, involves facts not even remotely comparable. It can be of interest only to the extent of the statement which respondent has quoted from the opinion:

> "The lien is presumed on proof of due delivery on request of lawful supplies, until such presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable for payment." *The Bronx*, 246 F. 809.

But at this stage of the litigation the burden of proof is of small moment. As said by the Ninth Circuit Court of Appeals: "In as much as all the facts are before the court, the question of the burden of proof is perhaps unimportant * * *". *North Coast Stevedoring Co.* v. *U. S.*, 17 F. (2) 874, 877 (C. C. A. 9).

This court and other admiralty courts have observed that the first section of the 1910 Act relieved the supplier of alleging and proving, in the first instance, that he relied on the credit of the vessel, thus giving the supplier the initial benefit of a prima facie presumption. The statute so provided to counteract the old presumption of the general maritime law that when a supplier dealt with the owner directly no lien was contemplated. *Morse D. D. & Repair Co.* v. *U. S.*, 1 F. (2) 233 (C. C. A. 2). This history and purpose are explained by Fitz-Henry Smith, Jr., one of the draftsmen of the statute, when his article says:

> "The first section also removes the presumption of credit to the owner in the case of contracts made by him, and simplifies the law by making the lien depend upon a contract by the furnisher with one in authority to bind the vessel for necessaries. * * * The last provision of the first section does not mean, however, that the lien shall exist *regardless* of the question of credit." *Harvard Law Review*, Vol. 24, pp. 189, 190.

But respondent did not merely fill an isolated order for oil. Respondent in supplying the petitioners' vessels, dealt with its buyer under an imposing long-term contract by which it provided for its own protection. To have inserted therein an express reservation of a lien might have deprived respondent of a prospective profitable customer. As stated by this court, respondent made a specific contract "instead of resting on the lien which the law would otherwise give" and "must rely on the contract it made for itself." *The President Arthur*, 279 U. S. 572. See also, *The Defiance*, 3 F. (2) 48, 51 (D. C. N. C.). Respondent's agreement with W. L. Comyn & Sons is fully exposed before this court. And to repeat the quotation from Fitz-Henry Smith, Jr., the statute does not mean "that the lien shall exist *regardless* of the question of credit." That question is to be determined objectively from the contract; for "the subjective intention of the (supplier), if contrary to the written memorial of the contract made by the parties, is immaterial." *The President Arthur*, 72 F. (2) 276, 279 (1934-C. C. A. 2).

About the formal document, respondent has tendered practically nothing in defense of petitioners' construction. As to the facts outside of that instrument, respondent's brief (p. 18) in substance merely says that its habit of typing the name of the vessel supplied upon its invoice for the price of oil was inconsistent with sole reliance upon the personal credit of its buyer. Perhaps. But such invoices were mailed only to W. L. Comyn & Sons (R. 101, 105, 113). Respondent's system of billing, in the absence of demands upon the vessel owners, tended merely to keep straight the numerous dealings with its buyer (R. 63; Ex. H). Respondent's correspondence treated all indebtedness as that of W. L. Comyn & Sons and contained no suggestion of demand upon the vessel owners (R. 64-99). In addition, respondent listed W. L. Comyn & Sons in its "sales register, and sales made to it were entered therein, under its name" (R. 34). Respondent's custom of designating each vessel in each invoice serves to emphasize all respondent's other practices and all provisions of the formal agreement which join in reflecting clearly respondent's exclusive reliance upon its buyer's individual credit.

A furnisher's method of billing or invoicing the price of necessaries has often been disregarded or outweighed by the courts in their denial of a maritime lien. For instance, in *The Kate*, 164 U. S. 458, 460, the supplier charged the coal to the charterer and to the vessels as well; in *The Valencia*, 165 U. S. 264, 265, the supplier charged the coal on its books to "S.S. Valencia and owners"; in *The Liberator*, 5 F. (2d) 585 (C. C. A. 4), the supplier "kept its account against each ship, its agents and owners"; and in *The Millinocket*, 266 F. 392, 393 (D. C. N. Y.), "the name of the vessel is typewritten first in the bills for the coal." These cases are sufficient to show that respondent's business habit of invoicing its buyer vessel by vessel, is a mere circumstance to be given proper, but not undue, consideration along with other facts. Here, it is the only off-key note in the entire song.

Since the problem of whether respondent's oil contract negatived the maritime liens asserted against the "Brand" and the "Stjerneborg" is largely of first impression in this court, petitioners repeat their contention that such contract operated to waive *in limine* respondent's right to a lien, which could arise only upon later actual delivery of oil to a vessel (46 U. S. C. A. 974). Distinguishing between the advance waiver of the right before the lien has arisen, and the subsequent waiver of the lien itself after it has accrued, an appellate court has recently said:

> "In considering the question of waiver, there is a wide difference between taking a security at the time the supplies are furnished to the vessel and taking one thereafter. In the first situation insistence upon a security may indicate that the credit of the vessel was not relied upon; and without such reliance no lien arises. W. A. Marshall & Co. v. The S.S. President Arthur, 279 U. S. 564, 73 L. Ed. 846. As that case shows, the facts are strictly construed to imply a 'waiver' of lien in the first situation." *In re Marine Transit Corporation*, 94 F. (2) 7 (C. C. A. 2).

Even in the Ninth Circuit Court of Appeals, which has been extreme in the allowance of the maritime lien for necessaries, the right to that remedy was denied because of a waiver *in limine* as a part of the supplier's original contract with the charterer. *The Astorian*, 57 F. (2) 85, 90 (C. C. A. 9).

Where a supplier, for a fixed term becomes legally obligated to sell fuel oil on the credit of its buyer for use of "any and all vessels owned, chartered and/or operated" later by the buyer, petitioners contend:

(1) That, in the absence of express provision to the contrary, fuel oil sold thereunder is delivered on the sole credit of the buyer;

(2) That since the supplier can not possibly know in advance whether the buyer's subsequent chartering or operating agreement will vest it with authority to bind the

vessels, the supplier has lost its power of choice and cannot be relying on the credit of the vessel;

(3) That, in the language of this court in the *Piedmont* case (254 U. S. 9), the pledge of the vessel's credit was not necessary to her receipt of fuel oil under the contract; and

(4) That the supplier has waived *in limine* his right to a future lien "by agreement or otherwise" (46 U. S. C. A. 974).

To this contention support has been extended by decisions denying a lien claimed by suppliers so obligated in similar general contracts.

The Cratheus, 263 F. 693 (C. C. A. 5);
The Rajola, 7 F. Supp. 618 (D. C. N. Y.);
The Ben Lawers, 42 F. (2) 897 (D. C. Wash.);
The Dictator, 18 F. (2) 131 (D. C. La.);
The Irages, 283 F. 445 (D. C. Fla.);
The Millinocket, 266 F. 392 (D. C. N. Y.).

In consequence, upon the oil contract point, respondent's claim of maritime lien fails.

CONCLUSION.

Petitioners renew the prayer of their main brief in this court.

Respectfully submitted,

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